

**Golfview Manor Nursing Home, Inc. and Teamsters
Local Union 261 a/w International Brotherhood
of Teamsters, AFL-CIO. Case 6-CA-31168**

October 26, 2000

DECISION AND ORDER

**BY CHAIRMAN TRUESDALE AND MEMBERS FOX
AND HURTGEN**

Pursuant to a charge filed on February 23, 2000, the General Counsel of the National Labor Relations Board issued a complaint on March 7, 2000, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 6-RC-11745. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On September 15, 2000, the General Counsel filed a Motion for Summary Judgment. On September 19, 2000, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis of the Board's unit determination in the representation proceeding.

Specifically, the Respondent argues, as it did in the underlying representation case, that the unit employees—registered and licensed practical nurses—are supervisors within the meaning of the Act. In its response to the Notice to Show Cause the Respondent relies particularly on the decisions of the Third Circuit Court of Appeals in cases involving nurses. In *Passavant Retirement & Health Center v. NLRB*, 149 F.3d 243 (3d Cir. 1998), denying enf. 323 NLRB 598 (1997), one of those two cases, the Court specifically stated that it was "not creating a per se rule that LPNs are supervisors." Indeed, each case must be decided on its facts and in the instant matter, the Regional Director carefully considered the duties of the Respondent's nurses and found that the assignments and directions made by them do not involve independent judgment. Similarly, their involvement in the evaluation process does not directly influence personnel actions such as wages or job tenure. And finally, the Regional Director found that the nurse's role in the

disciplinary process is reportorial in nature. In these circumstances, we denied review of the Regional Director's decision.

Further, the Respondent's citation to the decisions of the Third Circuit is selective and fails to acknowledge that the Board's position on the supervisory status of nurses has been upheld by the Eighth, Ninth, and District of Columbia Circuits. *Lynwood Health Care Center, Minnesota v. NLRB*, 148 F.3d 1042 (8th Cir. 1998), enf. 323 NLRB No. 200 (1997) (not reported in Board volumes); *Grandview Health Care Center v. NLRB*, 129 F.3d 1269 (D.C. Cir. 1997), enf. 322 NLRB No. 54 (1996) (not reported in Board volumes); *Providence Alaska Medical Center v. NLRB*, 121 F.3d 548 (9th Cir. 1997), enf. 321 NLRB No. 100 (1996) (not reported in Board volumes).

Moreover, we note that the Supreme Court has recently granted certiorari to resolve the conflict in the circuits over the meaning of the term "independent judgment" in Section 2(11), as well as the issue of which party has the burden of proof in establishing supervisory status. *NLRB v. Kentucky River Community Care*, 530 U.S. 1304 (2000). Resolution of those issues will directly resolve the question whether the Board applied a reasonable legal standard in determining that the nurses' routine discharge of professional or technical judgment in directing aides in delivering services in accordance with patient care plans did not make them supervisors. In our judgment, resolution of those issues also bears on the Respondent's contention that nurses exercise "independent judgment" in resolving minor disputes between aides over such matters as work assignments, since those kinds of minor conflicts are inherent in any group activity, and if group leaders were deemed supervisors merely for smoothing them over, the concept of a leadperson that Congress enacted 2(11)'s independent judgment requirement to preserve would be rendered meaningless. Finally, resolution of those issues bears on the Respondent's contention that nurses have the authority to send aides home for extreme and flagrant violations of its rules. Thus, resolution of the independent judgment issue bears on the question whether independent judgment is required in order to apply the Respondent's rules in such extreme situations. And resolution of the burden of proof issue bears on the question whether the Respondent has established that nurses actually possess the authority to suspend aides without first checking with conceded supervisors who are either on duty or on call.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously

unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).¹ Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Pennsylvania corporation, with an office and place of business in Aliquippa, Pennsylvania, Respondent's facility, has been engaged in the operation of a skilled nursing care facility. During the 12-month period ending January 31, 2000, the Respondent, in conducting its business operations, derived gross revenues in excess of \$100,000, and for the same period, purchased and received goods valued in excess of \$5000 from points outside the commonwealth of Pennsylvania. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held January 10, 2000, the Union was certified on January 21, 2000, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time registered nurses and licensed practical nurses employed by the Employer at its Aliquippa, Pennsylvania facility; excluding all office clerical employees and guards, other professional employees and supervisors as defined in the Act and all other employees.²

The Union continues to be the exclusive representative under Section 9(a) of the Act.

¹ Member Hurtgen dissented in the underlying decision denying review of the Regional Director's Decision and Direction of Election. However, Member Hurtgen agrees that the Respondent has not raised any new matters that are properly litigable in this unfair labor practice case. See *Pittsburgh Plate Glass v. NLRB*, 313 U.S. 144, 162 (1941). In light of this, and for institutional reasons, he agrees with the decision to grant the General Counsel's Motion for Summary Judgment.

² The unit is as described on the Certification of Representation issued on January 21, 2000.

B. Refusal to Bargain

Since February 2, 2000, the Union has requested the Respondent to bargain, and, since February 16, 2000, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after February 16, 2000, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Golfview Manor Nursing Home, Inc., Aliquippa, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Teamsters Local Union 261 a/w International Brotherhood of Teamsters, AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time registered nurses and licensed practical nurses employed by the Employer at its Aliquippa, Pennsylvania facility; excluding all office clerical employees and guards, other professional employees and supervisors as defined in the Act and all other employees.

(b) Within 14 days after service by the Region, post at its facility in Aliquippa, Pennsylvania, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 6 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 16, 2000.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region at-

³ If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

testing to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Teamsters Local Union 261 a/w International Brotherhood of Teamsters, AFL-CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time registered nurses and licensed practical nurses employed by us at our Aliquippa, Pennsylvania facility; excluding all office clerical employees and guards, other professional employees and supervisors as defined in the Act and all other employees.

GOLFVIEW MANOR NURSING HOME, INC.